IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 17-10-2006

CORAM:

THE HONOURABLE MR.JUSTICE S.J.MUKHOPADHAYA
AND
THE HONOURABLE MR.JUSTICE F.M.IBRAHIM KALIFULLA

O.S.A.Nos.386, 390 and 418 of 2001

O.S.A.No.386 of 2001:

M/s.Larsen & Toubro Limited,
(ECC Construction Group), Madras.
Rep. by its Manager (Legal), Chennai. ..
Appellant

vs.

1. Tamil Nadu Electricity Board,
N.P.K.R.R.Maligai,
Electricity Avenue,
Anna Salai, Chennai-600 002,
by its Chairman.

2. The Chief Engineer,
North Madras Thermal Power Project Civil Division XII,
Ennore, Madras-57. .. Respondents

Original Side Appeal No.386 of 2001 filed under order XXXVI Rule 1 of O.S. Rules (under Clause 15 of the Letter Patent) against the judgment and decree of this Court in C.S.No.472 of 1999, dated 23.4.2001.

O.S.A.No.390 of 2001:

1. Tamil Nadu Electricity Board,
N.P.K.R.R.Maligai,
Electricity Avenue,
Anna Salai, Madras-2,
Rep. by its Chairman.

2. The Chief Engineer,
Mettur Thermal Power Project,
Tamil Nadu Electricity Board,
Anna Salai, Madras-2.

3. The Chief Engineer,
North Madras Thermal Power Project,
Madras-57. .. Appellants

vs.

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M/s.Larsen & Toubro Limited,
(ECC Construction Group),

rep. by its Deputy General Manager (Legal),
Madras. .. Respondent

Original Side Appeal No.390 of 2001 filed under order XXXVI Rule 1 of O.S. Rules (under Clause 15 of the Letter Patent)against the judgment and decree of this Court in C.S.No.110 of 1996, dated 23.4.2001.

O.S.A.No.418 of 2001:

1. Tamil Nadu Electricity Board,
N.P.K.R.R.Maligai,
Electricity Avenue,
Anna Salai, Madras-2,
Rep. by its Chairman.

2. The Chief Engineer,
Mettur Thermal Power Project,
Tamil Nadu Electricity Board,
Anna Salai, Madras-2.

3. The Chief Engineer,
North Madras Thermal Power Project,
Madras-57. .. Appellants

vs.

M/s.Larsen & Toubro Limited,
(ECC Construction Group),
rep. by its Deputy General Manager (Legal),
Madras. .. Respondent

Original Side Appeal No.418 of 2001 filed under order XXXVI Rule 1 of O.S. Rules (under Clause 15 of the Letter Patent)against the judgment and decree of this Court in C.S.No.705 of 1992, dated 23.4.2001.

For appellant in O.S.A.No.386 of 2001
and respondent in O.S.A.Nos.390 and 418 of 2001:
Mr.K.V.Ananthakrishnan

For respondents in O.S.A.No.386 of 2001
and appellants in O.S.A.Nos.390 and 418 of 2001:
Mr.N.Muthusamy

JUDGMENT

The plaintiff in C.S.No.472 of 1999 is the appellant in O.S.A.No.386 of 2001. The defendants in C.S.Nos.110 of 1996 and 705 of 1992 are the appellants in O.S.A.Nos.390 and 418 of 2001. The plaintiff and the defendants are common in all the three suits.

2. In C.S.No.472 of 1999, the plaintiff filed the suit for recovery of a sum of Rs.16,13,720/- being reimbursement claim of sales tax on Works Contract paid on behalf of the second defendant therein, along with

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interest in a sum of Rs.8,68,573.26, in all, for a sum of Rs.24,82,293.26 with interest at 18% per annum on Rs.16,14,170/-. The suit was dismissed by the learned single Judge on the Original Side of this Court on 23.4.2001 on the ground that the plaintiff failed to prove the claim and that the suit was barred by limitation. O.S.A.No.386 of 2001 has been preferred by the plaintiff against the said judgment and decree.

3. In C.S.No.110 of 1996, the very same plaintiff filed the suit for recovery of a sum of Rs.49,08,690/- with interest at 20% for the work done in respect of the construction of 275 meter high R.C.C. multiflue chimney from the second defendant therein. The suit was decreed for a sum of Rs.32,20,611/- with interest at 12%. Aggrieved against the judgment and decree dated 23.4.2001 in C.S.No.110 of 1996, the defendants therein, the Tamil Nadu Electricity Board, have come forward with the appeal in O.S.A.No.390 of 2001. Pending appeal, by way of interim order, the appellants were directed to deposit a sum of Rs.65,19,604/-, which was duly deposited by the appellants. By a subsequent order dated 1.7.2002 passed in C.M.P.No.16519 of 2003 in O.S.A.No.390 of 2001, the plaintiff was permitted to withdraw the said sum after furnishing a bank guarantee. It is stated that though the bank guarantee was furnished, due to technical reasons in executing the same, the amount was not withdrawn by the plaintiff.

4. The plaintiff in C.S.No.705 of 1992 filed the said suit for recovery of a sum of Rs.35,63,818.34 with interest at 21% on Rs.24,79,178.04. The suit was decreed on 23.4.2001 for a sum of Rs.19,96,445.01 with interest at 12% per annum on Rs.19,96,445.01. Aggrieved against the said judgment and decree dated 23.4.2001, the defendants therein, namely the Tamil Nadu Electricity Board has come forward with O.S.A.No.418 of 2001. Pending appeal in O.S.A.No.418 of 2001, as per order dated 13.3.2002 passed in C.M.P.No.744 of 2002, a sum of Rs.15,42,096/- was deposited by the appellants and was also paid to the respondent-plaintiff.

5. Though the claim for reimbursement of sales tax made in C.S.No.472 of 1999 had nothing to do with the other two claims made in C.S.Nos.110 of 1996 and 705 of 1992, except that such a claim was in respect of the work with reference to which the claims came to be made in one of the suits, all the three suits were tried in common by the learned single Judge on the Original Side of this Court and the suits came to be disposed of by a common judgment dated 23.4.2001. As stated in the earlier paragraphs, while the suit in C.S.No.472 of 1999 came to be dismissed, relief was granted in the other two suits in favour of the plaintiff. Having regard to the nature of claims made in C.S.No.472 of 1999 as against the claims in C.S.No.110 of 1996 and 705 of 1992, we propose to deal with O.S.A.No.386 of 2001 separately, while O.S.A.Nos.390 and 418 of 2001 can be dealt with in common. Since the parties are common in all the three appeals, we will refer to the plaintiff in the same manner as the plaintiff herein, while the defendants who are the appellants in O.S.Nos.390 and 418 of 2001, will be hereinafter referred to as the TNEB (Tamil Nadu Electricity Board).

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6. In the first instance, we propose to deal with the appeals preferred by the TNEB in O.S.A.Nos.390 and 418 of 2001, which relate to the claim of the plaintiff in C.S.Nos.110 of 1996 and 705 of 1992.

O.S.A.Nos.390 and 418 of 2001:

7. The brief facts which resulted in the filing of the above two Suits can be narrated as under:

The TNEB published its Notification with its design and construction of two numbers of Cooling Towers (in short, C.T) C.T.3 and C.T.4 under Ex.P-1 dated 29.10.1985. The plaintiff submitted its bid for construction of the said two Cooling Towers and by Ex.P-2 dated 20.10.1986, the TNEB issued its letter of acceptance for the construction of the said CTs., by which the total price of the contract for the construction of both the CTs. was accepted for a sum of Rs.5,35,00,000/-. For certain stated reasons, the plaintiff did not commence the construction of CTs. as per the schedule. As per the terms of the contract, the scheduled date of completion of C.T.3 was 19.4.1988 and C.T.4 was 19.10.1988. However, the construction of the two CTs. was actually completed only on 31.5.1989 and 31.10.1989 respectively. Similarly, the plaintiff undertook the contract of the design and construction of 220 meter high chimney for the Mettur Thermal Power Project of the TNEB by its offer dated 29.12.1986, which was accepted by the TNEB on 20.5.1987 for a total value of Rs.1,69,62,000/-. As per the letter of acceptance dated 20.5.1987, the scheduled date of completion of 220 meter high chimney was 19.1.1989. However, the actual date of completion by the plaintiff was 19.7.1989. According to the plaintiff, in respect of the construction of the CTs. and the 220 meter high chimney at Mettur Thermal Power Project, a sum of Rs.13,70,008.10 and Rs.11,09,169.94 respectively was payable by the TNEB. The plaintiff therefore filed the suit in C.S.No.705 of 1992 claiming a sum of Rs.24,79,178.04 (Rs.13,70,008.10 + Rs.11,09,169.94). The plaintiff also claimed interest on the said sum @ 21%, which according to the plaintiff worked out at a sum of Rs.10,84,640.30. Therefore, the total claim in the said suit was for a sum of Rs.35,63,818.34. Be that at it may, the TNEB raised a claim dated 10.10.1991 as against the plaintiff by way of penalty of Rs.24,11,638/- for the delayed construction of the two CTs., plus a sum of Rs.5,71,543/- by way of notional penalty for the delayed construction of 220 meter high chimney and a sum of Rs.8,20,000/- towards recovery from the plaintiff, which was alleged to have been gained on account of the deletion of rack and pinion lift from the scope of 220 meter high chimney. In all, the claim of the TNEB was Rs.38,03,181/- (Rs.37,85,181/- as stated in the plaint in C.S.No.705 of 1992). Therefore, apart from claiming a sum of Rs.35,63,818.34, the plaintiff also prayed for a permanent injunction to restrain the TNEB from recovering any amount from other contracts towards penalty or damages for any alleged default in the construction of the contract pertaining to Mettur Thermal Power Project.

8. Be that as it may, the plaintiff undertook the construction of 275 meter high R.C. multiflue chimney at North Madras Thermal Power Project of the TNEB in the year 1990. In respect of the said contract, the plaintiff is stated to have raised a Bill in April 1992 for the work done and the Chief Engineer of North Madras Thermal Power Project was stated to have

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certified the said Bill for the gross value of Rs.44,22,135/-. The construction of the said 275 meter high R.C.C. multiflue chimney was stated to have been completed and handed over on 4.10.1993. In respect of the said construction, the final Bill submitted by the plaintiff was stated to be at Rs.29,94,431/-. The TNEB is stated to have paid Rs.10,00,000/- and Rs.5,70,594/- on 13.3.1994 and 12.8.1994 respectively leaving a balance of Rs.14,23,837/-. That apart, a sum of Rs.17,35,095/- by way of security deposit for the said contract and a sum of Rs.61,679/- towards the alleged excess recovery made from the plaintiff for power supply, were stated to have been due to the plaintiff from the TNEB. According to the plaintiff, a sum of Rs.14,23,837/- with-held by the TNEB included a sum of Rs.13,90,535/- which was made by way of deduction towards penalty/liquidated damages on account of the delayed construction of C.T.3 and C.T.4. and 220 meter high chimney at Mettur Thermal Power Project. The plaintiff laid the suit in C.S.No.110 of 1996 claiming a sum of Rs.32,20,611/- (Rs.14,23,837/- + Rs.17,35,095/- + Rs.61,679) along with the interest claim of Rs.16,88,008/-. In all, a sum of Rs.49,08,619/- was claimed in C.S.No.110 of 1996.

9. The TNEB resisted the suit in C.S.No.705 of 1992 by contending that the total Bill amount due to the plaintiff towards C.T.3 and C.T.4 as well as the 220 meter high chimney inclusive of 5% retention money and security deposit, was only Rs.19,63,337/-, whereas the TNEB was entitled to impose penalty for delayed completion of the cooling towers as well as the chimney, which worked out to a sum of Rs.38,03,181/-. It was stated that a sum of Rs.19,63,737/- from the final Bill payable in respect of both the contracts, namely construction of cooling towers and chimney, was made, apart from recovering a sum of Rs.13,90,535/- from the amounts due to the plaintiff in respect of the contracts executed with North Madras Thermal Power Project, leaving a balance sum of Rs.4,49,309 to be recovered from the plaintiff. According to the TNEB, such penalty was leviable as per Clause 26 of the General Conditions of Contract.

10. Before the learned single Judge, since all the three suits were tried together, common evidence was let in. On the side of the plaintiff, P.Ws.1 and 2 were examined, while on the side of the defendants, D.Ws.1 and 2 were examined. The plaintiff marked Exs.P-1 to P-47, while on the side of the defendants, Exs.D-1 to D-24 were marked.

11. As many as 12 issues were framed in C.S.No.705 of 1992 and eight issues were framed in C.S.No.110 of 1996.

12. As far as the claim made in C.S.No.705 of 1992, the learned single Judge held that the plaintiff was entitled for a sum of Rs.12,22,008.10 under the contract for two CTs. and Rs.7,74,436.91 under the contract for chimney, in all, a sum of Rs.19,96,445.01. As against the claim for interest @ 21% per annum from May 1990, the learned single Judge awarded interest @ 12% p.a. from May 1990. The issue numbers 1 to 12 in C.S.No.705 of 1992 were answered as above.

13. In C.S.No.110 of 1996, the learned single Judge ultimately decreed the suit for the principal amount as claimed by the plaintiff, namely for a sum of Rs.32,20,611/- and as far as the interest was concerned, as against 20% claimed by the plaintiff, the learned single

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Judge awarded only 12% p.a. from the respective dates as mentioned in paragraph 12 of the plaint. The issue numbers 1 to 8 were ordered on the above terms.

14. In the view of the learned single Judge, having regard to Ex.P-15, the letter issued by the Superintending Engineer/Civil, Mettur Thermal Power Project to the plaintiff, directing the plaintiff to send proposal for extension of time for completion of C.T.3 and C.T.4 with an undertaking not to claim any extra monetary benefit for such extension and the failure of the TNEB from sending any reply to Ex.D-20 dated 9.9.1988, wherein the plaintiff sought for further extension, it will have to be held that the time sought for by the plaintiff was deemed to have been granted.

15. As far as the construction of 220 meter high chimney was concerned, hereagain, the learned single Judge held that though the construction of the chimney should have been completed on or before 19.1.1989, it was completed only on 19.7.1989 with a delay of 181 days, the plaintiff sought for extension of time on 21.1.1991, which was not replied at all by the TNEB, but a completion certificate was issued on 9.10.1991 under Ex.P-6 and therefore, having failed to refuse the extension of time sought for by the plaintiff and having allowed the completion of work without any murmur as to the delay, the TNEB cannot be permitted to say that the delay was attributable to the plaintiff.

16. The learned single Judge also observed that the TNEB failed to prove that due to the delay in completion of the C.Ts. and chimney, it had resulted in any loss to the TNEB.

17. As far as the alleged gain made by the plaintiff by way of deletion of the erection of imported rack and pinion lift in a sum of Rs.8,20,000/-, the learned single Judge held that by virtue of such deletion, the plaintiff did not gain anything. The learned single Judge also held that having regard to the inabilities of the plaintiff from importing the said lift, it will have to be held that, that part of the contract was impossible of performance and therefore, the TNEB was not entitled to claim any amount on that score.

18. The learned single Judge held that in view of the conclusion in C.S.No.705 of 1992 that the imposition of penalty by the TNEB cannot be sustained, the recovery of Rs.13,90,535/- from the running Bill of North Madras Thermal Power Project was not justified.

19. As regards the retention money of Rs.17,35,095/- towards rectification of certain defects in the aviation warning lights, the learned single Judge held that since the permanent power supply was given only on 12.1.1995, which was beyond the defects liability period, the said amount cannot be retained by the TNEB.

20. As far as the recovery of Rs.61,679/- on the ground of power supply, the learned single Judge held that since it was not the case of the TNEB that the plaintiff agreed to pay any current consumption charges or any electricity tax, the said sum cannot be retained.

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21. Assailing the judgment and decree in C.S.Nos.705 of 1992 and 110 of 1996, the learned Standing Counsel for the TNEB contended that the plaintiff has admitted the delay in the completion of the construction of C.T.3 and C.T.4 as well as 220 meter high chimney, that the delay was wholly attributable to the plaintiff either in commencing the construction or in the completion of the works and that the TNEB was not in any way responsible for the delay. The learned Standing Counsel would further contend that as per the terms of the contract, unless the time extension was granted by the TNEB in writing, the plaintiff cannot avoid payment of liquidated damages/penalty. According to the learned Standing Counsel, by virtue of Clause 3.10 of Ex.D-1 acceptance letter, as well as Clause 26 of the General Conditions of Contract, the TNEB was entitled to levy penalty/liquidated damages @ ½% for every week of delay on the quantum of the left over work and since the period of delay was admitted, the quantum of damages levied cannot be challenged.

22. As far as the claim of the TNEB for a sum of Rs.8.20 lakhs by way of gain to the plaintiff pursuant to the deletion of the rack and pinion lift, the learned Standing Counsel would contend that had the TNEB insisted for the lift without making the amendment to the contract, the plaintiff would have incurred more than Rs.23 lakhs which was the sum provided for the provision of the lift, as the cost of the indigenous lift would have been more than Rs.31 lakhs and thus, the plaintiff stood to gain to an extent of Rs.8.20 lakhs. According to the learned Standing Counsel, in the absence of any challenge to the levy of penalty made under Exs.D-8, D-9 and D-16, the plaintiff cannot be permitted to make a claim for the said sum. The learned Standing Counsel for the TNEB also contended that there was sufficient evidence let in show that because of the delay in the completion of the C.Ts. and the chimney, there were consequential prejudice caused to the TNEB as well as the general public and in the circumstances, the levy of penalty/damages cannot be found fault with. As far as the claim relating to the retention money and the recovery of power consumption charges in the matter of construction of 275 meter high multiflue chimney, the learned Standing Counsel would contend that since the aviation lights did not function properly within the contract period and since the plaintiff failed to rectify the defects, the TNEB was entitled to retain the said money. The learned Standing Counsel also contended that the recovery of a sum of Rs.61,679/- towards power consumption by the plaintiff, was also justified.

23. As against the above submissions, Mr.K.V.Ananthakrishnan, learned counsel appearing for the plaintiff contended that it was only pursuant to Ex.P-15 issued by the TNEB, the plaintiff came forward with Ex.D-20 seeking for extension of time for completion of construction of both the C.Ts., that the TNEB impliedly extended the time for construction of C.T.3 and C.T.4 from 19.4.1988 to 19.12.1988 and from 19.10.1988 to 19.6.1989 respectively and that when the plaintiff needed further extension of time, the plaintiff applied for such extension in writing on 12.11.1988 and 3.11.1989 under Exs.D-7 and D-6, which extension sought for was not rejected by the TNEB and therefore, the ultimate completion of construction of the C.Ts. on 31.5.1989 and 31.10.1989 cannot be said to have involved in any delay.

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24. As far as the amendment to the contract for the deletion of the provision of the lift was concerned, the learned counsel appearing for the plaintiff would contend that since the provision for the imported lift became impossible of performance, the plaintiff cannot be blamed for its deletion from the contract. Learned counsel for the plaintiff would further contend that since the TNEB had agreed for the deletion by way of an amendment and since the plaintiff has not gained anything by such deletion to the contract, the recovery resorted to, to an extent of Rs.8.20 lakhs, was not justified.

25. Similarly, as regards the delay involved in the construction of 220 meter high chimney, it was contended that when the construction was at the level of 23 meters, the TNEB wanted the plaintiff to demolish the portion, though the construction was not defective, which was also established by oral evidence and therefore, even as regards the construction of the chimney, the delay cannot be attributed to the plaintiff and the consequent levy of damages/penalty as claimed by the TNEB, was not justified.

26. As regards the retention money of Rs.17,35,095/- against rectification of the aviation lights, according to the learned counsel for the plaintiff, sufficient materials were placed before the Court to prove that the defects were rectified during the defects liability period, i.e. before 4.10.1994, that since the permanent supply to the chimney was given only on 19.1.1995, no liability can be fastened on the plaintiff on the ground of the alleged defect to the aviation lights. As far as the recovery of Rs.61,679/- towards payment of tariff was concerned, it was contended that since there was no terms in the contract for payment of tariff, the said recovery by the TNEB was not justified. In any event, it was contended that as far as the rectification of the aviation lights was concerned, the TNEB can only claim any amount spent for rectification and cannot retain the entire security deposit given for the purpose.

27. On the above referred to pleadings and submissions, the following issues arise for consideration in O.S.A.No.418 of 2001: (relating to C.S.No.705 of 1992):

(i) Was there any delay in completion of the construction of C.T.3 and C.T.4 and 220 meter high chimney?

(ii) Whether such delay was attributable to the plaintiff? If so, whether the plaintiff was liable to pay the liquidated damages/penalty as per the terms of the contract?

(iii) Whether the TNEB was justified in recovering Rs.8.20 lakhs being the difference between imported and indigenous make of the provision for the rack and pinion lift?

(iv) Whether by virtue of Section 74 of the Contract Act, the TNEB is dis-entitled to recover any amount by way of penalty/damages? and

(v) Is the TNEB liable to pay the suit claim of Rs.24,79,178.04 with interest @ 21% per annum?

28. The following issues arise for consideration in O.S.A.No.390 of 2001 (relating to C.S.No.110 of 1996):

(i) Whether the TNEB was entitled to adjust a sum of Rs.13,90,535/- towards liquidated damages/penalty in respect of the works connected with Mettur Thermal Power Project?

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(ii) Whether the TNEB is entitled to retain the security deposit of Rs.17,35,095/- on the ground of the defects in the provision of the aviation lights to 275 meter high multiflue chimney?

(iii) Whether the TNEB was entitled to recover a sum of Rs.61,679/- by way of power supply tariff? and

(iv) Whether the plaintiff is entitled for the suit claim of Rs.32,20,611/- with interest @ 12% per annum from the date of its claim?

29. Issue Nos.(i) and (ii) in O.S.A.No.418 of 2001 and Issue No.(i) in O.S.A.No.390 of 2001:

Issue Nos.(i) and (ii) in O.S.A.No.418 of 2001:

"(i) Was there any delay in completion of the construction of C.T.3 and C.T.4 and 220 meter high chimney?

(ii) Whether such delay was attributable to the plaintiff? If so, whether the plaintiff was liable to pay the liquidated damages/penalty as per the terms of the contract?"

Issue No.(i) in O.S.A.No.390 of 2001:

"Whether the TNEB was entitled to adjust a sum of Rs.13,90,535/- towards liquidated damages/penalty in respect of the works connected with Mettur Thermal Power Project?"

As the above issues in the two appeals are inter-connected, they are being dealt with together. At the outset, it will have to be stated that there is no dispute with reference to the terms of the agreement contained in Exs.D-1,D-9, D-19, D-26, D-1 (= P-2) and D-3. Ex.D-1 = Ex.P-2 dated 20.10.1986 are one and the same, which is the acceptance letter issued by the TNEB in respect of the construction of C.T.3 and C.T.4. Similarly, Ex.D-3 is the acceptance letter dated 20.5.1987 issued by the TNEB in respect of the construction of 220 meter high R.C.C. chimney. Ex.D-9 dated 6.2.1991 is the contract book relating to 220 meter high R.C.C. chimney. Ex.P-4 is the agreement dated 29.11.1991 in respect of the construction of C.T.3 and C.T.4. Clause 3.10 in Ex.D-1 = Ex.P-2 pertains to the levy of liquidated damages. The said Clause reads as under:

> "3.10: Liquidated damages:
>
> This will be ½% per week of delay, subject to a maximum of 10% of the value of the works remaining incomplete on date of scheduled completion or date of extension granted by the Board if any. No interim penalties will be leviable."

Identical to such Clause in the acceptance letter Ex.D-3 dated 20/22.5.1987 pertaining to 220 meter high chimney is Clause 3.11. The General Conditions of Contract are part of the agreement book Ex.D-9. Clause 26 of the General Conditions of Contract talks about the consequences of delay in commencement or progress or neglect of work or suspension of works by the contractor and forfeiture of the Earnest Money, Security Deposit and with-held amounts as well as the power of the TNEB to levy penalty upto ½% of the contract price per week to a maximum of 10%. The said Clause reads as under:

> "If the Contractor fails in the due performance of his contract within the time fixed by the contract or any extension thereof and the purchaser shall have

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suffered any loss from the delay occasioned by such failure, the Contractor is liable at the discretion of the Engineer to a penalty upto ½% of the Contract price per week reckoned on the Contract value of such portion only of the works as cannot in consequence of the delay be used commercially and efficiently during each month between the appointed or extended time as the case may be and the actual time of acceptance or taking over of the work and such penalty shall be in full satisfaction of the Contractor's liability for delay but shall not in any case exceed 10 per cent of the contract value of such portion of the work."

30. A combined reading of the above referred to Clauses discloses that in the event of any delay in the completion of the contract awarded to the plaintiff, the TNEB had every power to levy liquidated damages/penalty at the rate of ½% per week of a delay to the value of the unfinished work upto the maximum of 10%. The question therefore that remains to be considered is whether there was any delay at the instance of the plaintiff in order to hold that the TNEB had every right to invoke the above referred to Clauses and levy liquidated damages/penalty on the plaintiff.

31. Under Ex.D-8 dated 10.10.1991, the TNEB imposed a penalty of Rs.24,11,638/- for the delayed construction of C.T.3 and C.T.4 and a sum of Rs.5,71,543/- towards notional penalty for the delayed completion of 220 meter high chimney. By Ex.P-9 dated 5/1992, the TNEB made it clear that the levy of penalty imposed cannot be re-considered. Ex..P-3 dated 9.10.1991 is the work completion certificate in respect of C.T.3 and C.T.4 mentioning that the completion date of C.T.3 was 31.5.1989 and C.T.4 was 31.10.1989. Ex.P-6 dated 9.10.1991 is the work completion certificate in respect of 220 meter high R.C.C. chimney, as per which the said construction was completed on 19.7.1989. Under Ex.P-15 dated 6.9.1988, the TNEB requested the plaintiff to send proposals for extension of time for the construction of C.T.3 and C.T.4 by indicating the probable completion date for each tower separately with reasons for extension of time for each tower along with an undertaking that the proposed extension would not confer any monetary benefit and that they will not make any extra claim due to the extension sought for. Under Ex.D-20 dated 9.9.1988, the plaintiff applied for extension of time upto 19.12.1988 for C.T.3 and upto 19.6.1989 for C.T.4. It is relevant to note that though Ex.D-20 dated 9.9.1988 was not replied to by the TNEB, the plaintiff did not complete the construction of C.T.3 and C.T.4 by 19.12.1988 and 19.6.1989 respectively. On the other hand, the construction as mentioned in Ex.P-3 dated 9.10.1991 was completed only on 31.5.1989 and 31.10.1989 respectively. In fact, subsequently, under Ex.D-7 dated 12.11.1988, the plaintiff sought for further extension for the completion of construction of C.T.3 and C.T.4 upto 31.3.1989 and 19.6.1989 respectively. Subsequently, under Ex.D-6 dated 3.11.1989, the plaintiff applied for further extension of time for the completion of C.T.3 upto 31.5.1989. A perusal of Exs.D-6 and D-7 discloses that the reasons mentioned in those communications were not attributable to any act of the TNEB. In Ex.D-20 dated 9.9.1988, the plaintiff claimed that there was time delay at the instance of the TNEB in deciding the type of foundation to be adopted for

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C.T.3 and that while the plaintiff suggested pile foundation as against raft foundation, which was stipulated in the original proposal of the TNEB, which suggestion was made taking into account the soil condition at the place where the C.T.3 was located, the TNEB ultimately expressed its decision to proceed with raft foundation itself in its communication dated 23.5.1987 (vide Ex.D-20 dated 9.9.1988). In other words, the plaintiff would try to suggest that in respect of the C.T.3, the plaintiff came forward with a suggestion to go in for pile foundation instead of raft foundation, that the said suggestion though was not accepted by the TNEB, such a decision was taken only in May 1987, and therefore, the said part of the delay cannot be attributed to the plaintiff.

32. It is relevant to state that under Ex.D-2, which is part of the tender specifications, it was specifically mentioned that the basin supporting structure should be in the form of a raft structure. It is also not i n dispute that as per the instructions to bidders under Ex.D-9, Clause 3.1 specifically mentions that the bidder should inspect the site before submission of his bid and obtain all information required, which Clause specifically mentions the requirement of examining "obstructions and hindrances that may arise etc., which may have a cost implication or affect the work schedule."

33. Learned counsel for the plaintiff, by relying upon the inclusions and exclusions details contained in Ex.P-43, wherein under the heading 'Exclusions', soil investigations having been mentioned, Clause 3.1 of instructions to bidders would specifically exclude the soil condition. We are unable to agree with the submissions so made on behalf of the plaintiff. The soil investigations referred to in the scope of work was never intended to mean that the plaintiff was to be totally exonerated of the soil condition prevailing while submitting its bid after making prior inspection of the site in question. The reference to soil investigation in the 'Exclusions' Clause in the scope of work was only to mean that it was not expected of the plaintiff to do any soil investigation, but the same cannot be taken to mean that the plaintiff was precluded from making its own investigation of the soil condition before submitting its bid for acceptance. When the plaintiff could come forward with the suggestion after the acceptance of the bid based on its own soil investigation, it cannot lie in the mouth of the plaintiff to state that because, in the scope of work, the soil investigation was mentioned in the 'Exclusions' Clause, it was not bothered to investigate about the soil condition before submitting its bid. It is wholly unbecoming of a reputed contractor like the plaintiff to have come forward with such a lame excuse for the purpose of the case. Therefore, we reject the said submission made on behalf of the plaintiff.

34. Further, it is relevant to note that though the plaintiff suggested to go in for pile foundation instead of raft foundation before commencing the work as scheduled, the TNEB did not agree to the suggestion of the plaintiff, but ultimately insisted on to go ahead with the original scheduled plan of raft foundation, which the plaintiff also ultimately carried out in the construction of the CTs. In any event, even going by Ex.D-20, the said communication only related to C.T.3 and the suggestion relating to change of foundation was confined to C.T.3 alone and had no mention about C.T.4. Therefore, we are unable to appreciate the stand of the plaintiff that the delay in the commencement of the work after the issuance of Ex.P-2 = Ex.D-1 dated 20.10.1986 in respect of the construction of C.T.3 and C.T.4 till 23.5.1987, was attributable to the

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TNEB. On the other hand, the plaintiff was solely responsible for not commencing the work immediately after the issuance of the acceptance letter dated 20.10.1986 Ex.D-1 = Ex.P-2, in respect of the construction of C.T.3 and C.T.4. Under Ex.P-2 = Ex.D-1, the completion period schedule was fixed as 18 months for C.T.3 and 24 months for C.T.4 from the date of the issuance of the acceptance letter. Therefore, the scheduled date of completion was 19.4.1988 for C.T.3 and 19.10.1988 for C.T.4. However, in Ex.D-20, the plaintiff came forward with a request to grant an extension of time upto 19.12.1988 for C.T.3 and 19.6.1989 for C.T.4. Even this time schedule was not strictly adhered to by the plaintiff. By yet another communication Ex.D-7 dated 12.11.1988, the plaintiff sought for further extension of time upto 31.3.1989 for C.T.3 and 19.6.1989 for C.T.4 . The only reason mentioned in the said communication dated 12.11.1988 Ex.D-7 was that various structures were to be precast and other works relating to the construction took longer time and greater number of man hours than anticipated earlier by it. Therefore, the said reason can have no bearing on the part of the TNEB in order to state that such delay beyond 19.12.1988 and 19.6.1989 was attributable to the TNEB. Still further, in the subsequent letter dated 3.11.1989 under Ex.D-6, when the plaintiff wanted further extension for the completion of C.T.3 upto 31.5.1989, the plaintiff had only mentioned that they could not complete the electrical works, providing and fixing of F.R.P. doors in the fan stacks and supply and fixing sluice gates and screen in the outflow channel in time, as the plaintiff faced certain difficulties in getting the raw materials. Hereagain, the reasons can have no bearing on the part of the TNEB or its officials.

35. It is also relevant to state that while under Ex.D-7 dated 12.11.1988, the plaintiff sought for extension of time in respect of C.T.4 upto 19.6.1989, there was no other requisition for further extension in respect of C.T.4. Ex.P-3 dated 9.10.1991 discloses that the actual completion of C.T.3 and C.T.4 was only by 31.5.1989 and 31.10.1989. Thus, for the time delay between 19.6.1989 and 31.10.1989 in respect of C.T.4, the plaintiff had no explanation to offer.

36. A cumulative effect of all the above factors only leads to the conclusion that the delay in completion of C.T.3 and C.T.4 was wholly attributable to the plaintiff and plaintiff alone.

37. The plaintiff would rely upon Ex.P-15 dated 6.9.1988 to contend that it was only at the instance of the TNEB, the plaintiff applied for extension of time. In Ex.P-15, the TNEB while referring to the plaintiff's letter dated 23.2.1988 (not exhibited), requested the plaintiff to send proposals for extension of time for both C.T.3 and C.T.4 indicating their probable completion date with separate reasons for each towers. The TNEB also wanted an undertaking that the extension of time would not confer any monetary benefit and extra claim for the period of extension. In fact, pursuant to Ex.P-15 dated 6.9.1988 only, the plaintiff came forward with Ex.D-20 dated 9.9.1988. As stated earlier, inspite of specific stipulations in Ex.P-15 dated 6.9.1988, in Ex.D-20 dated 9.9.1988, there was no reference to C.T.4 as to why the plaintiff wanted time extension. That apart, we are unable to reconcile Ex.P-15 with Ex.D-20 in order to hold that the TNEB was at any point of time agreed for extension of time.

38. It will be relevant to note that when a vital project concerning the TNEB, namely the construction of Cooling Towers for the purpose of generation of electricity, was contracted out through the plaintiff, the

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TNEB cannot be expected to get itself entangled in a ruffle with the plaintiff in the matter of construction after the issuance of the acceptance letter, which was issued as early as on 20.10.1986. In fact, the time schedule for completion of C.T.3 was fixed as 19.4.1988. The first ever communication from the plaintiff as regards the delay in commencement of the work appears to have been written only on 23.2.1988. In such a situation, the TNEB was well justified in its approach in expecting the plaintiff to commence the work at the earliest point of time without causing further delay, so that the construction of the Cooling Towers is completed on the date and time of completion assured by the plaintiff. Ex.P-15 letter dated 6.9.1988 can only be read in the abovesaid manner and the said letter dated 6.9.1988 cannot be expected to have been written by the TNEB with a view to grant extension of time to the plaintiff without any demur. In fact, the tenor of the letter dated 6.9.1988 only goes to show that the TNEB wanted to know as to on which date the plaintiff would be in a position to complete the construction, as the TNEB was placed in such a piquant situation of having entrusted the work with the plaintiff and lost nearly two years, and cannot loose further time by cancelling the contract and go for a fresh bid, as that would jeopardise the commencement of its power project. It will have to be stated that by the reason of the plaintiff's imprudent act of not commencing the work as scheduled immediately after the issuance of the acceptance letter dated 20.10.1986, the TNEB was put in a tight spot where it was obliged to allow the plaintiff to proceed with the work and ensure its completion at whatever point of time feasible for the plaintiff.

39. In this context, it is also relevant to refer to Clause 11 of the General Conditions of Contract, which specifically mentions "Provided always, that unless the contractor takes a written application to the engineer was on or before the time when the cause of delay is occurring or about to occur and unless the time is extended by the engineer, the prescribed time shall not be extended notwithstanding delays from the foregoing or any other causes of whatsoever kind." The said Clause 11 of the General Conditions of Contract as found under Ex.D-9 covers all types of reasons which would result in the delay of the completion, for which a written order extending the time should be obtained by the concerned contractor. When such a specific stipulation has been provided under Ex.D-9 agreement, the plaintiff cannot be heard to say that the extension of time should be inferred from its own communication applying for extension and the mere permission of the TNEB to continue to execute the work.

40. For all the abovesaid reasons, we hold that the delay was solely attributable to the plaintiff, that the delay in the construction and completion of C.T.3 and C.T.4 was wholly attributable to the plaintiff, that such delay was not covered by any period of extension granted by the TNEB, and that the TNEB was well justified in invoking Clause 3.10 of the acceptance letter dated 20.10.1986 as well as Clause 26 of the General Conditions of Contract in order to entitle the TNEB to impose liquidated damages/penalty as stipulated therein.

41. This conclusion apart, we find that as per Clause 3.10 of the acceptance letter as well as Clause 26 of the General Conditions of Contract, the TNEB is entitled to levy liquidated damages/penalty at the rate of ½% for every week of delay in respect of the unfinished volume of work. Even here, we find that while as per the original acceptance letter, the scheduled date of completion was 19.4.1988 and 19.10.1988, the actual date of completion was 31.5.1989 and 31.10.1989 respectively. For

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the purpose of levying the maximum of 10% by way of liquidated damages/penalty, the delay should be only 20 weeks. Since the delay was more than a year in each cases, the TNEB was entitled to levy the maximum rate provided under the above referred to Clauses. Even for the sake of argument, if it is to be accepted that by virtue of Exs.D-20 and P-15, the TNEB agreed for time extension, the extended time limit was 19.12.1988 and 19.6.1989 for C.T.3 and C.T.4 respectively. From that date atleast, if the ultimate date of completion is calculated, then again, there was more than five months and 4-1/2 months delay. If the said period between 19.12.1988 and 31.5.1989, and 19.6.1989 and 31.10.1989 is calculated, the TNEB was fully entitled to levy the maximum rate of penalty/liquidated damages.

42. Apart from the above, as contended by learned Standing Counsel for the TNEB, the letter of the TNEB dated 10.10.1991 under Ex.D-8 imposing the penalty of Rs.24,11,638/- for C.T.3 and C.T.4, was never under challenge. In other words, the plaintiff never bothered to question the imposition of penalty as made by the TNEB under Ex.D-8. Neither the quantum nor the very imposition of penalty was ever challenged by the plaintiff. It will have to be stated that the said order of imposition of penalty by the TNEB under Ex.D-8 continue to remain in force even till this date. Therefore, even on this ground, the levy of penalty as imposed by the TNEB cannot be called in question.

43. In the course of cross-examination of P.W.1, P.W.1 has categorically admitted that he was not aware whether any soil test was conducted by them before submitting the tender. Further, the following admission in his cross-examination as regards the consequences of the delay also justifies the levy of penalty/damages by the TNEB. The admissions are: "It is true that the defendants had informed us that the construction of cooling towers 3 and 4 and the chimney are for generating more electricity and distribution of the same to the general public. It is true that if there is a delay the defendants would incur loss by losing money. .... It is true that the cooling towers 3 and 4 and chimney awarded to us constituted only a part of the Mettur Thermal Power Project. The other part of the project were given to other contractors. It is true that if there was a delay on our part, it would lead to a chain reaction and the entire project would get delayed in commissioning. (witness adds - There was no delay on our part in this case)."

44. As far as the 220 meter high chimney was concerned, the same was governed by Ex.D-3 acceptance letter of the TNEB dated 22.5.1987. As per the said acceptance letter, the completion period was fixed as 20 months from the date of the issue of the said letter Ex.D-3. As stated earlier, Clause 3.11 which is identical to Clause 3.10 of Ex.P-2 = Ex.D-1, the TNEB was entitled to levy penalty/liquidated damages @ ½% for every week's delay on the unfinished volume of work to a maximum of 10%. Admittedly, while the scheduled date of completion was 19.1.1989, the actual date of completion was 19.7.1989. Unlike C.T.3 and C.T.4, the plaintiff never even asked for any extension of time in the case of chimney. There was also no written order of the TNEB granting extension of time beyond 19.1.1989. Under Ex.P-6 dated 9.10.1991, the actual date of completion has been certified by the TNEB as 19.7.1989. There was thus a delay of six months in completing the said work.

45. It is not in dispute that under Clause 53 of the General Conditions of Contract as well as Clause 10 of Ex.P-4 agreement dated 29.11.1991, the plaintiff has agreed for adjustment of the amounts due

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from it under any other contract from the amounts payable under that contract. The plaintiff also agreed for the adjustment of any amount due under that contract from the amounts payable under any other contract. That portion of the said Clause under the agreement is not in dispute between the parties.

46. Having regard to our above conclusions, we hold on issue Nos.(i) and (ii) in O.S.A.No.418 of 2001 and on issue No.(i) in O.S.A.No.390 of 2001 that there was delay in the completion of the construction of C.T.3 and C.T.4 Cooling Towers and 220 meter high chimney, that such delay was wholly attributable to the plaintiff and that the plaintiff was therefore liable to pay liquidated damages/penalty as per the terms of the contract and consequently, the TNEB was entitled to adjust the sum of Rs.13,90,535/- from the amounts payable to the plaintiff in respect of the works at North Madras Thermal Power Project to compensate towards liquidated damages/penalty payable in respect of works connected with Mettur Thermal Power Project.

47. Issue No.(iii) in O.S.A.No.418 of 2001: "Whether the TNEB was justified in recovering Rs.8.20 lakhs being the difference between imported and indigenous make of the provision for the rack and pinion lift?"

This issue relates to the recovery of a sum of Rs.8.20 lakhs being the difference between the imported and indigenous make of the provision for the rack and pinion lift. As per the original contract for the construction of 220 meter high R.C.C. chimney, the plaintiff accepted to supply, install and commission a passenger lift as per Annexure-I of the letter dated 3.12.1986 (Vide Ex.D-3 dated 20.5.1987) of the TNEB. The price for the supply and installation of the said lift was also agreed for a cost of Rs.23 lakhs, which was included in the total cost of the contract, namely Rs.1,92,62,000/-. Subsequently, under Exs.P-14 dated 5.4.1989, the plaintiff came forward with a stand that though it applied to Government of India for an import licence for the import of the rack and pinion lift, the same was turned down by the Chief Controller of Imports and Exports, New Delhi on the ground that the said item was indigenously available. The plaintiff went on to state that the lift of indigenous make would cost 20% extra over and above the local supplier and in the event of the TNEB not agreeing for the extra cost factor, the plaintiff had no other alternative except to seek for deletion of the said item from the scope of the contract. Subsequently, under Ex.P-8 dated 21.4.1990, the TNEB issued an amendment to the acceptance letter consequent to the decision of the TNEB to delete the supply and installation of the rack and pinion type lift from the scope of the contract itself. The contract value got reduced to Rs.1,69,62,000/- and it was specifically informed to the plaintiff that the said amendment was issued without prejudice to the TNEB's right to recover the amount gained by the plaintiff on account of the deletion of the rack and pinion lift from the scope of the contract. In the said communication Ex.P-8, copy of which was marked to the concerned Superintending Engineer of Mettur Thermal Power Project, it was indicated that, that amount that was gained by the plaintiff due to the deletion, can be tentatively taken as Rs.8.2 lakhs. Thereafter, the plaintiff while acknowledging receipt of the TNEB's letter Ex.P-8 dated 21.4.1990, took the stand in Ex.P-45 dated 7.8.1990 that it will not be in a position to bear any extra cost over and above Rs.23 lakhs for the installation of rack and pinion lift by the TNEB making its own arrangement.

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48. On a perusal of the above referred to documents, namely Ex.D-3 dated 20.5.1987 - acceptance letter of the TNEB for the construction of 220 meter high R.C.C. chimney, Ex.P-14 dated 5.4.1989 - plaintiff's letter expressing its inability to provide the rack and pinion lift, Ex.P-8 dated 21.4.1990 of the TNEB making an amendment to the acceptance letter Ex.D-3 dated 20.5.1987 and providing for deletion, supply and installation of rack and pinion lift as well as Ex.P-45 dated 7.8.1990 - plaintiff's acknowledgement of Ex.P-8, the following facts emerge:

(a) The plaintiff agreed to provide a rack and pinion lift confirming to the specification as per Annexure-I of letter of the TNEB dated 3.12.1986 at a cost of Rs.23 lakhs.

(b) Subsequently, under Ex.P-14 dated 5.4.1989, the plaintiff sought for deletion of the said provision from the contract on the ground that it was not in a position to import the said lift due to the rejection of import licence by the Chief Controller of Imports and Exports.

(c) The said item was indigenously available in the market.

(d) The plaintiff was not prepared to even provide the indigenous make of the lift, but sought for 20% escalation over and above the cost of the local manufacturer for providing the said lift.

(e) Under Ex.P-8 dated 21.4.1990, the TNEB came forward with an amendment to the acceptance letter for the deletion of the lift without prejudice to its right to recover whatever amount gained by the plaintiff by such deletion. (f) Under Ex.P-45, the plaintiff protested for any recovery being made by the TNEB towards any extra cost incurred by it in getting a lift provided for the chimney.

49. The relevant factors to be noted are that it was at the instance of the plaintiff, the TNEB had to come forward with an amendment to the acceptance letter deleting the provision for rack and pinion lift. As per the terms of the contract, the plaintiff agreed to provide the passenger lift at a cost of Rs.23 lakhs. Therefore, it was for the plaintiff to adhere to the said terms of the contract and provide the passenger lift as agreed. It was not the case of the plaintiff that the provision for passenger lift in the construction of the chimney was dependent upon the import of the lift from a foreign country. In fact, the acceptance letter does not state that the provision of a passenger lift should be imported one. Though the plaintiff would claim under Ex.P-14 that its application for import licence for the lift was rejected, there was nothing on record to support the said stand. The plaintiff has not even furnished the details of any orders said to have been passed by the Chief Controller of Imports and Exports, New Delhi. When once the plaintiff agreed to provide a passenger lift at a cost of Rs.23 lakhs, the plaintiff was not expected to come forward with a different claim that an indigenous lift would cost more than Rs.23 lakhs, that the TNEB should agree for escalation and above all, the plaintiff should be provided with 20% more than whatever the costs that would be charged by the indigenous manufacturer of the lift. In fact, it will have to be stated that after agreeing to provide a passenger lift to the chimney at a cost of Rs.23 lakhs, the plaintiff sought for escalation in its costs by taking an unreasonable stand that the cost of indigenous lift was on the higher side. In effect, the plaintiff placed the TNEB in a tight spot to either make its own arrangement for providing a passenger lift or in the event of the plaintiff being asked to provide a passenger lift, the TNEB should agree for a higher cost than what was agreed to under the agreement and the acceptance letter Ex.D-3.

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50. Apparently, taking note of the vulnerable position in which the TNEB was placed in the construction of the chimney, which was part of its other construction activities for the generation of electricity in its Thermal Power Project, the plaintiff wanted to take advantage of the situation or attempt to charge a higher rate in providing a passenger lift to the chimney by throwing the blame on the Chief Controller of Imports and Exports and the local manufacturer. It would have been quite understandable if the plaintiff has come forward with a suggestion to provide the lift of an indigenous make with no extra cost. On the other hand, even in Ex.P-14 dated 5.4.1989, the plaintiff made it a pre-condition that in the event of the indigenous lift being provided by the plaintiff, the TNEB should be prepared for 20% extra cost over and above the rates quoted by the local manufacturer.

51. All the above factors would only go to show that the plaintiff had not come with clean hands when it wanted to resist the claim of the TNEB as regards the extra price involved in the provision of a passenger lift to the chimney.

52. In the above stated background, when Ex.P-8 dated 21.4.1990 is analysed, no fault can be found with the stand of the TNEB, that the amendment to the acceptance letter by way of deletion of the passenger lift was without prejudice to the TNEB's right to recover whatever amount gained by the plaintiff on account of such deletion. What was meant by gain made by the plaintiff, has been rightly understood by the plaintiff itself in Ex.P-45 as extra cost over and above Rs.23 lakhs, which was agreed to between the parties for providing the rack and pinion lift by the plaintiff. Further, even in Ex.P-8 itself, the TNEB while marking a copy to the Superintending Engineer, Mettur Thermal Power Project, indicated the extra cost at a tentative sum of Rs.8.2 lakhs. It is not the case of the plaintiff that the cost would not go to an extent of Rs.8.2 lakhs.

53. In the above stated circumstances, while holding that the TNEB was well justified in seeking for recovery of Rs.8.20 lakhs by way of difference in cost between the imported and indigenous make of the passenger lift, it will have to be held that in the absence of any contest to the quantum of such extra cost, the recovery effected by the TNEB on that score cannot also be held to be unjustified.

54. Issue No.(ii) in O.S.A.No.390 of 2001: "Whether the TNEB is entitled to retain the security deposit of Rs.17,35,095/- on the ground of the defects in the provision of the aviation lights to 275 meter high multiflue chimney?"

This amount is part of the suit claim in C.S.No.110 of 1996. According to the plaintiff, the TNEB retained the said sum of Rs.17,35,095/- even after the expiry of defects liability period dated 4.10.1994, which was illegal. It is the case of the plaintiff that the said money was retained by way of security deposit in furtherance of the contract relating to the design and construction of 275 meter high R.C.C. multiflue chimney at North Madras Thermal Power Project, that the said project was completed and handed over to the third defendant in C.S.No.110 of 1996 on 4.10.1993, that the final 'M' Book was also signed by the plaintiff on 28.3.1994 and that the final Bill was submitted on 31.3.1994. On behalf of the plaintiff, it was stated that the retention of the said sum on the ground that the aviation lights fitted by the plaintiff in 275 meter high R.C.C. multiflue chimney was defective, was not justified, inasmuch as after the completion of the Project on 4.10.1993, the plaintiff was obliged to ensure proper

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performance of the equipments fitted on the chimney only for a period of one year which expired by 4.10.1994, that during the said period, the plaintiff ensured that the aviation lights were properly working and therefore the retention of security deposit beyond the said period was illegal and unjustified.

55. According to the TNEB, though the plaintiff completed the chimney work and handed over the same to the TNEB on 4.10.1993 and the completion certificate was also issued on 4.10.1993, in the completion certificate itself, it was stated that the plaintiff should attend to rectification of certain defects in the aviation warning lights. It was contended that though the lights were imported from U.S. and the total cost of the lights inclusive of all tax was Rs.33 lakhs which was paid by the TNEB, the said lights were found to be defective after its installation and therefore the same could not be used. It was also claimed that the defects were duly informed to the plaintiff well before the defects liability period, namely 4.10.1994 i.e. on 2.9.1994, followed by reminders on 29.9.1994 and 19.1.1995. It was therefore contended that despite the intimation about the defects and the reminders, the plaintiff failed to rectify the defects. The TNEB placed reliance upon Clause 42.1 of the General Conditions of Contract for Civil Works, under which the plaintiff was held to be liable for replacement of any part of the plant or works found to be defective. It was also contended that since the plaintiff did not rectify or replace the defective aviation warning lights, the TNEB was justified in with-holding the E.M.D. and security deposit as per the terms of the contract.

56. From the above respective contentions, the question that arises for consideration is whether the aviation lights fitted by the plaintiff were defective and such defects were not rectified during the defect rectification period?

57. The completion certificate of the chimney as admitted by both the parties was issued on 4.10.1993. As per the terms of the agreement, the defects rectification period was stated to be one year from the date of the completion of the Project. It is also not in dispute that under Clause 42.1 of the General Conditions of Contract for Civil Works, from the date of the issuance of the completion certificate till the expiry of 12 calendar months, the contractor was liable for the replacement of any part of the plant or works found to be defective from causes arising from faulty design, materials or workmanship and for making good any damage arising therefrom. Under Ex.D-10 dated 2.9.1994, the TNEB has sent a telex message to the plaintiff stating as under:

> "NORTH MADRAS THERMAL POWER PROJECT – 3 X 210 MW – CONSTRUCTION OF 275 M HIGH RCC MULTIFLUE CHIMNEY CONFORMING TO SPECN.NO.SECT.I/NMTPP 13/STAGE-I-AVON AVIATION WARNING LIGHT – UNDER REPAIRS – PLEASE DEPUTE SUITABLE PERSON TO CARRYOUT THE ABOVE REPAIRS IMMEDIATELY (.)"

A telex message Ex.D-11 was also sent subsequently on 29.9.1994 regarding the "repairs in Avon's life lights and aviation warning light RCC multiflue chimney" by stating that no action was taken so far to carry out the repairs and to put "avon lift and aviation warning lights into use". Subsequently, there was another telex message under Ex.D-12 dated 9.1.1995 which was sent by the TNEB regarding the defective aviation warning

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lights. As against the above referred to documents relied on by the TNEB, under Ex.P-25 dated 7.7.1994, a communication issued by the Executive Engineer of the TNEB was filed on behalf of the plaintiff to state that the defects in four number aviation warning lights were rectified and were re-installed in position. The said letter also stated that all the lights were also found in working condition. Based on the said Ex.P-25 dated 7.7.1994, the plaintiff under Ex.P-27 dated 17.12.1994 asked for refund of the security deposit of Rs.17,35,095/-. But to the complaints made by the TNEB through Exs.D-10 to D-12, the plaintiff sent reply dated 3.10.1994 under Ex.P-29 stating that their Engineer was deputed to the site on 30.9.1994 and 1.10.1994, that four fittings out of nine were not functioning, that the fuse was burnt in one of the fittings located at 77 meter elevation and on replacement of the fuse, the fitting was found functioning normally and also claiming that in all the three fittings, main transformers were found burnt, since the voltage supply was more than 300 volts. According to the plaintiff, burning of the transformers was due to the high voltage supply since the aviation lamps were connected to construction supply. The plaintiff also stated that they were trying to rectify the transformers through local sources. It was also stated that the TNEB should arrange for permanent power source to the system to energise the fittings and that if the same was not done, the other fittings were also likely to get damaged. Under Ex.P-30 dated 3.11.1995, the plaintiff sent its reply to the subsequent telex messages of the TNEB dated 10.5.1995, 1.6.1995 and 13.10.1995 reiterating that because of the operation of the aviation lights from the construction power supply, the failure occurred and that the TNEB should arrange for the regular power supply. It was also claimed that inspite of the said defects due to the reasons of improper maintenance of the system, the plaintiff replaced the transformers, re-conditioned the equipment and set the same right and handed over the same to the TNEB on 11.4.1995. As regards the problem relating to day and night mode operations, it was stated that since more than two years have passed after handing over of the system in October 1993, the TNEB should only contact the supplier directly for any further rectification.

58. A combined reading of Exs.D-10 and D-11 and Exs.P-25 and P-29 disclose that whatever defects that were found in the aviation warning lights as on 7.7.1994, were rectified and were re-installed in position. Further, as on 7.7.1994, as per Ex.P-25, all the lights were found in working condition. Subsequently, the defects were pointed out only under Exs.D-10 and D-11. Ex.D-10 referred to one of the aviation lights which was reiterated in Ex.D-11. Under Ex.P-29, the plaintiff made it clear that whatever defects which were pointed out pursuant to Ex.D-11, were duly rectified and were put in order, as on 3.10.1994 (Ex.P-29). The defects rectification period was only between 4.10.1993 and 3.10.1994. There was no document filed on behalf of the TNEB refuting any of the stand of the plaintiff as stated in Ex.P-29 dated 3.10.1994. Therefore, from the evidence available on record as regards the aviation warning lights, it will have to be concluded that during the operation of defects rectification period, namely between 4.10.1993 and 3.10.1994, whatever defects were there, they were duly rectified by the plaintiff. Therefore, the stand of the TNEB in its written statement that despite its intimation of the defects by telex messages dated 29.9.1994 and 9.1.1995, the defects were not rectified by the plaintiff, cannot be accepted. Ex.P-30 dated 3.11.1995 issued by the plaintiff shows that the further communications of

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the TNEB were on 10.5.1995, 1.6.1995 and 13.10.1995 by way of telex messages. Even Ex.D-12 was dated 9.1.1995 i.e. long after 3.10.1994, the date of expiry of the defects rectification period. Therefore, for whatever defects which had occurred subsequent to 3.10.1994, the plaintiff cannot in any way be blamed. It will have to be stated that the TNEB has miserably failed to establish that the so-called defects in the functioning of the aviation warning lights, which was stated to have occurred in the month of September 1994, were never rectified by the plaintiff de-hors Ex.P-29 in order to hold that the retention of the security deposit of Rs.17,35,095/- was justified. If really the stand of the plaintiff as stated in Ex.P-29 was not true, nothing prevented the TNEB from sending suitable reply explaining the real defects which were existing or which were not really rectified as claimed by the plaintiff in Ex.P-29. Therefore, in the absence of any such materials on record, we are constrained to hold that the stand of the TNEB was not acceptable and therefore, the retention of the security deposit of Rs.17,35,095/- was wholly illegal and unjustified. We therefore answer the said issue in favour of the plaintiff and against the TNEB.

59. Issue No.(iii) in O.S.A.No.390 of 2001: "Whether the TNEB was entitled to recover a sum of Rs.61,679/- by way of power supply tariff?" According to the plaintiff, in no part of the agreement relating to construction of 275 meter high multiflue chimney at North Madras Thermal Power Project, the plaintiff agreed for payment of the power supply tariff. The TNEB on the other hand, would contend that a sum of Rs.25,954/- was recovered towards current consumption charges and a sum of Rs.35,725/- towards 4% electricity tax which was statutorily payable by the plaintiff, in all, a sum of Rs.61,679/-. In support of its stand, the TNEB relied upon Ex.D-13 dated 4.11.1991. Ex.D-13 is a communication stated to have been issued by the Member (Distribution) of the TNEB. The said communication dated 4.11.1991 after making a reference to the Tamil Nadu Government Gazette Notification No.4/87, dated 14.10.1991, is stated to have been issued under Act No.32 of 1991, mentioning that the levy of additional tax on consumption of energy @ 4% on the price of energy consumption has to be made with effect from 1.9.1991 on all the consumers except certain categories. We are not concerned with the exceptions provided in the Notification. It is also stated that such levy of additional tax will have to be worked out on the price of the energy consumed for September 1991 onwards in respect of high tension services.

60. According to the plaintiff, and as rightly claimed by it, the contract for construction of 275 meter high multiflue chimney at North Madras Thermal Power Project was signed as early as in the year 1990. Admittedly, the levy of 4% additional tax was stated to have been imposed by the State Government only with effect from the current consumption charges payable from the month of September 1991. The Tamil Nadu Government Gazette Notification itself was dated 14.10.1991. Therefore, there could have been no reference about the payment of 4% additional tax at the time when the agreement came to be signed in the year 1990.

61. No documentary evidence was placed before the Court to show that the implication of the Government Gazette Notification dated 14.10.1991 formed part of the contract entered into in the year 1990 as between the plaintiff and the TNEB. Even the so-called news letter said to have been issued by the Member (Distribution) on 4.11.1991 was not addressed to the plaintiff. It was not disclosed as to whom the said communication was addressed nor was it claimed that it was part of any public document in

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order to state that it would bind all those who had high tension power supply. It is not the case of the TNEB that the plaintiff would come within the category of a person having high tension services. Therefore, in the absence of any acceptable documentary evidence binding the plaintiff to bear the 4% additional tax based on any Government Notification, it will be wholly unjustified to fasten the liability on the plaintiff for payment of any additional tax much less @ 4%.

62. As far as the claim of the TNEB for recovery of any sum by way of current consumption charges, hereagain, the TNEB has not placed any material to show that any such payment was made based on any receipt in proof of such power consumption availed by the plaintiff. Therefore, looked at from any angle, we are not able to sustain the claim of the TNEB to an extent of Rs.61,679/- by way of current consumption charges and recovery of additional electricity tax. Therefore, this issue is held in favour of the plaintiff.

63. Issue No.(iv) in O.S.A.No.418 of 2001: Whether by virtue of Section 74 of the Contract Act, the TNEB is dis-entitled to recover any amount by way of penalty/damages?

On this issue, learned counsel appearing for the plaintiff by relying upon Section 74 of the Contract Act, contended that even assuming that the TNEB had suffered any loss on the alleged breach of the contract by the plaintiff, the TNEB was bound to prove the loss suffered and in any event, the compensation for any such breach by way of loss can only be very reasonable and not as appropriated by the TNEB based on Clause 3.10/3.11 of the acceptance letters dated 20.10.1986 and 20.5.1987 or Clause 26 of the General Conditions of Contract. Learned counsel appearing for the plaintiff relied upon the decision of the Supreme Court reported in 1964 (I) MLJ 60 = 1964 (1) SCR 515 (Fateh Chand vs. Balkishan Das) which was subsequently followed by the Supreme Court in 2003 (2) C.T.C. 282 (ONGC Ltd. Vs. SAW Pipes Ltd).

64. On the other hand, learned Standing Counsel for the TNEB contended that in the light of the subsequent decision of the Supreme Court reported in 2003 (2) C.T.C. 282 (cited supra) in having held that the parties once expressly agree for the recovery of a pre-estimated genuine liquidated damages, there is no necessity for the TNEB to still prove the loss suffered by it. Learned Standing Counsel also contended that since this question not having been specifically raised before the learned single Judge, the plaintiff should not be permitted to pursue this issue.

65. Having heard learned counsel for the respective parties, at the outset, we want to state that the issue being a legal issue, there should be no impediment for the plaintiff to raise the question at the appellate stage. Therefore, we reject the stand of the TNEB on that score. As far as the merits of the issue is concerned, in the decision of the Supreme Court reported in 2003 (2) C.T.C. 282 (cited supra), the Supreme Court has stated as under in paragraphs 40 and 41:

> "40. It cannot be disputed that for construction of the contract, it is settled law that the intention of the parties is to be gathered from the words used in the agreement. If words are unambiguous and are used after full understanding of their meaning by experts, it would be difficult to gather their intention different from the language used in the

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agreement. If upon a reading of the document as a whole, it can fairly be deduced from the words actually used therein that the parties had agreed on a particular term, there is nothing in law which prevents them from setting up that term. (Re: Modi & Co. v. Union of India, 1968 (2) SCR 565). Further, in construing a contract, the Court must look at the words used in the contract unless they are such that one may suspect that they do not convey the intention correctly. If the words are clear, there is very little the Court can do about it. (Re: Provash Chandra Dalui and another v. Biswanath Banerjee and another, 1989 Supp (1) SCC 487).

41. Therefore, when parties have expressly agreed that recovery from the contractor for breach of the contract is pre-estimated genuine liquidated damages and is not by way of penalty duly agreed by the parties, there was no justifiable reason for the arbitral tribunal to arrive at a conclusion that still the purchaser should prove loss suffered by it because of delay in supply of goods."

Even thereafter, after referring to Section 73 and Section 74 of the Contract Act, the Supreme Court has stated the legal position as under in paragraph 46:

"46. From the aforesaid Sections, it can be held that when a contract has been broken, the party who suffers by such breach is entitled to receive compensation for any loss which naturally arise in the usual course of things from such breach. These sections further contemplate that if parties knew when they made the contract that a particular loss is likely to result from such breach, they can agree for payment of such compensation. In such a case, there may not be any necessity of leading evidence for proving damages, unless the Court arrives at the conclusion that no loss is likely to occur because of such breach. Further, in case where Court arrives at the conclusion that the term contemplating damages is by way of penalty, the Court may grant reasonable compensation not exceeding the amount so named in the contract on proof of damages. However, when the terms of the contract are clear and unambiguous then its meaning is to be gathered only from the words used therein. In a case where agreement is executed by experts in the field, it would be difficult to hold that the intention of the parties was different from the language used therein. In such a case, it is for the party who contends that stipulated amount is not reasonable compensation, to prove the same."

(emphasis added)

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66. The Supreme Court in unambiguous terms stated that there should be no necessity for a party to lead evidence to prove the damages when once in the contract itself, the extent of loss is clearly stipulated and the parties agree for payment of such compensation. Having regard to the said settled legal position, we do not propose to dilate much on that issue.

67. Issue No.(v) in O.S.A.No.418 of 2001: "Is the TNEB liable to pay the suit claim of Rs.24,79,178.04 with interest @ 21% per annum?"
In view of our findings on issue Nos.(i),(ii), (iii) and (iv) in O.S.A.No.418 of 2001 and issue No.(i) in O.S.A.No.390 of 2001, we hold that the TNEB was not liable to pay any amount much less the suit claim of Rs.24,79,178.04. Therefore, the decree as granted by the learned single Judge in C.S.No.705 of 1992 is liable to be set aside. Accordingly, the same is set aside.

68. C.S.No.705 of 1992 is dismissed and O.S.A.No.418 of 2001 stands allowed with costs throughout.

69. Issue No.(iv) in O.S.A.No.390 of 2001: "Whether the plaintiff is entitled for the suit claim of Rs.32,20,611/- with interest @ 12% p.a. from the date of its claim? "
In the light of our conclusions on issue Nos.(ii) and (iii) in O.S.A.No.390 of 2001, we hold that the plaintiff is entitled for a decree in respect of the sum of Rs.17,35,095/- which was retained by the TNEB in the form of security deposit as well as a sum of Rs.61,679/- which was recovered by the TNEB towards current consumption charges and tax on power supply.

70. Having regard to the conclusions of the learned trial Judge on payment of interest, which was granted by the learned Judge @ 12% per annum from the date of the respective claims, we fully concur with the reasoning of the learned Judge and we hold that the above sum decreed in favour of the plaintiff is liable to be paid by the TNEB along with interest @ 12% per annum from the date of respective claims.

71. O.S.A.No.390 of 2001 stands partly allowed with proportionate costs throughout and the judgment and decree insofar as it related to the grant of Rs.13,90,535/- is set aside and in other respects, the suit in C.S.No.110 of 1996 shall stand decreed.

72. O.S.A.No.386 of 2001:

Brief facts which are required to be stated are:

The TNEB invited tenders for design and construction of 275 meter high R.C.C. chimney and cooling water system with skimmer bay at North Madras Thermal Power Project. The plaintiff submitted its tender and the contract was awarded in favour of the plaintiff under Contract No.SECT.I/E-1/A.6/NMTPP/SECT-13/D-394-91, dated 11.4.1991 and No.SECT.I/E-1/NMTPP/SECT-I-9/91, dated 20.6.1991 respectively. It was a 'Works Contract'. The plaintiff was therefore liable to pay the sales tax on the consumption of materials. In the acceptance letter, the Clause relating to payment of sales tax was to the following effect:

> "Sales tax: Prices accepted for the jobs do not include the Tamil Nadu Government Sales Tax on works contract. If such tax is applicable, TNEB is to reimburse in full to M/s.L & T the tax on completed work on documentary evidence of having paid such taxes. In the event of appeal against the sales tax so levied

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getting decided in favour of the Company, the benefit of the same should be passed on to the TNEB."

According to the plaintiff, the controversy as to whether sales tax was payable on Works Contract, was the subject matter of litigation and ultimately the Court held in the year 1993 that sales tax was payable on Works Contract. It is stated that between October 1993 and June 1994, the plaintiff paid a sum of Rs.20,04,665/- towards sales tax on Works Contract with reference to the construction of 275 meter high chimney and a sum of Rs.7,06,005/- in respect of cooling water system and skimmer bay. The plaintiff raised the Bills on 9.11.1995 and since the Bills were not settled, the plaintiff came forward with the Suit. At the time when the suit dated 9.11.1998 came to be filed, the claim relating to 275 meter high chimney was restricted to Rs.9,02,464/- since the plaintiff had a refund order to the tune of Rs.11,02,201/-. As far as the cooling water system and skimmer bay was concerned, the plaintiff included a sum of Rs.5,201/- towards additional tax paid over and above Rs.7,06,005/- towards sales tax for the assessment year 1992-93, in all, a sum of Rs.7,11,206/-. The plaintiff also reserved its right to amend the claim after the final assessment is made for the year 1993-94. The plaintiff therefore laid the suit for the above sums along with interest, in all for a sum of Rs.24,82,293.26 with further interest @ 18% on Rs.16,14,170/-.

73. The said claim was resisted by the TNEB contending that as per the terms of the contract, the TNEB agreed for reimbursement of sales tax, subject to actual payment of such tax and on production of authentic documents in proof of the same. According to the TNEB, since the claim was not supported by authentic documents, it was not liable to reimburse the said sum. It was also contended that the claim of sales tax reimbursement would fall under the heading "additional claim" as per the terms of the contract and since Clause 86 of the General Conditions of Contract stipulates that such extra claim should be preferred within three months from the date of completion of the work, and since the work was completed on 3.8.1993 and 4.10.1993, the claim made in 1995 was belated in point of time. It was also contended that the plaintiff having failed to include its claim in C.S.No.110 of 1996, filing of a separate suit without leave of the Court would render the suit itself not maintainable. It was also contended that the plaintiff having completed the work latest by 4.10.1993, the filing of the suit dated 9.11.1998 was barred by limitation.

74. On the above pleadings, the learned single Judge framed the following six issues in C.S.No.472 of 1999:

"(i) Whether the demand for reimbursement of sales tax to be made within 3 months from the date of completion of the work?

(ii) Does not the right to claim the sales tax arise only after the bills were raised on the defendants on 9.11.1995?

(iii) Whether the suit is hit by the provisions of Order 2 Rule 2 of C.P.C.?

(iv) Whether the suit is barred by limitation?

(v) Are not the defendants liable to pay interest at 18% p.a.?

(vi) To what relief the parties are entitled?"

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75. The learned single Judge dismissed the suit on the ground of limitation by holding that as per the contract entered into between the parties, immediately on demand of sales tax, the right to make a demand for recovery accrued, that even going by Exs.P-35 and P-36, the certificates issued by the Chartered Accountants which were dated 3.3.1995, filing of the Suit beyond three years from that date cannot be maintained. Assailing the said judgment and decree, the appellant has come forward with the present O.S.A.

76. Arguing for the appellant, learned counsel appearing for the appellant contended that the very liability to pay sales tax on Works Contract was contested by the various contractors including the plaintiff by filing writ petitions, that the said controversy came to be ultimately decided by a Division Bench of this Court in the judgment dated 23.12.1992 as reported in 1993 (Vol.88) S.T.C. 289 (L & T Ltd. vs. State of Tamil Nadu) and after the said judgment, the mode and method as to how sales tax on works contract is to be calculated was not crystallised by the Commercial Tax Departments, that only under Exs.P-40 and P-41, dated 29.6.1993 and 18.8.1994, circulars were issued by the Office of the Special Commissioner and Commissioner of Commercial Taxes, stating as to how the calculations are to be made by furnishing illustrative formula by way of Annexure and that thereafter only, the contractors were able to submit their Returns for assessment as provided under Section 12 of the Tamil Nadu General Sales Tax Act. It was therefore contended that the extent of liability of sales tax for the year 1993-94 was ultimately finalised only in July 1998 and January 2001 and therefore, the filing of the suit in November 1998 was well within time. As far as the authenticity of the claim for reimbursement was concerned, learned counsel contended that since the plaintiff was taking up contract works for various other exporters, the payment of sales tax was based on total purchases made for different exporters and therefore, the statutory Auditor's certificate which segregated the sales tax pertaining to the works contract with the TNEB should be held to be an authenticated document satisfying the clause relating to reimbursement of sales tax as specified in the acceptance letter of the TNEB as well as the General Conditions of Contract.

77. As against the above submissions, Mr.Muthusamy, learned Standing Counsel for the TNEB contended that the liability for sales tax arose as early as on 4.10.1993 when the contract was completed and the final Bill was made on 28.3.1994 and therefore, the filing of the suit beyond three years from those dates, i.e. on 9.11.1998, was clearly barred by limitation.

78. Learned single Judge while considering the contentions of the TNEB, based on Order 2 Rule 2 of the Code of Civil Procedure, held that the cause of action for the present suit was different from the cause of action in C.S.No.110 of 1996 and therefore, the said objection was not tenable though the learned single Jude dismissed the suit on the ground of limitation.

79. Therefore, the issues that arise for consideration in this appeal (O.S.A.No.386 of 2001) are only the following:

(i) Whether the suit was barred by limitation?

(ii) Whether the plaintiff is entitled for sales tax reimbursement and whether it was supported by authentic documents?

(iii) Is the plaintiff entitled for payment of interest @ 18% per annum?

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(iv) To what relief the parties are entitled to?

80. Issue Nos.(i) and (ii) in O.S.A.No.386 of 2001: "(i) Whether the suit was barred by limitation? (ii) Whether the plaintiff is entitled for sales tax reimbursement and whether it was supported by authentic documents?"

The liability for payment of sales tax by way of reimbursement is not in dispute. The relevant Clause which governs these issues is the one incorporated in the acceptance letter as well as Clause 86.1 of the General Conditions of Contract for Civil Works. The Clause as mentioned in the acceptance letter has been extracted in the initial part of this judgment. Clause 86.1 of the General Conditions of Contract for Civil Works is to the following effect:

> "Sales Tax: This, though a works contract, may attract payment of sales tax to the Government of Tamil Nadu as per the latest amendment to the Act. In that case, the sales tax or turnover tax shall be paid by the successful tenderer directly to the TNGST authorities as per the statutory requirements and the same will be reimbursed to the extent of actual payment as per rules, on production of authentic documents in proof of the same."

81. For the sake of convenience, the Clause as found in acceptance letter can also be extracted, which reads as under:

> Sales tax: Prices accepted for the jobs do not include the Tamil Nadu Government Sales Tax on works contract. If such tax is applicable, the TNEB has to reimburse in full to M/s.L & T the tax on completed work on documentary evidence of having paid such taxes. In the event of appeal against the sales tax so levied getting decided in favour of the Company, the benefit of the same should be passed on to the TNEB."

82. A combined reading of the above referred to Clauses makes it clear that the TNEB tacitly agreed to reimburse in full to the plaintiff whatever sales tax paid on works contract on completion of the work and on production of authentic documents in proof of such payment. Further, if the plaintiff subsequently derived any benefit in the appeal proceedings, the said benefit should be passed on to the TNEB. Therefore, in order to make a claim for reimbursement, the liability should have been ascertained, the payment should have been made, such payment should be supported by a valid proof in the form of authentic documents and only on satisfaction of the above requirements, the TNEB would be bound to make the reimbursement.

83. In the case on hand, as rightly contended by learned counsel for the plaintiff, the controversy as regards the very liability for payment of sales tax on works contract was keenly contested and the same came to be ultimately settled by a Division Bench decision of this Court dated 23.12.1992 (1993 (Vol.88) STC 289) (cited supra). Further, a perusal of Exs.P-40 and P-41 also discloses that instructions came to be issued by the Head of Commercial Taxes Department of the State of Tamil Nadu to all the assessing authorities as to how and in what manner the assessment of sales tax on Works Contract should be worked out. Ex.P-41 is circular

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dated 18.8.1994. The plaintiff completed its contract on 3.8.1993 and 4.10.1993. The plaintiff also stated to have paid part of its sales tax liability in October 1993 and the entirety of it in June 1994. Under Ex.P-35 and Ex.P-36, the plaintiff claimed for reimbursement of its sales tax liability based on the certificates issued by the statutory Auditors. Such certificates were dated 3.3.1995. Though in Ex.P-35, the claim was in the order of Rs.20,04,665/-, in the plaint, the plaintiff restricted it to Rs.9,02,464/- since in the meantime, the plaintiff had a refund to an extent of Rs.11,02,201/- as ordered by the Commercial Tax Department. Such refund came to be ordered in favour of the plaintiff in the assessment order of the Commercial Tax authorities stated to have been passed in July 1998. The above referred to factors only goes to show that the liability of the plaintiff was ultimately decided by the statutory authorities only in the month of July 1998 as far as the contract relating to 275 meter high R.C.C. multiflue chimney was concerned. As far as the sales tax liability of Rs.7,11,206/- was concerned, even according to the plaintiff, at the time when the suit was filed, the assessment order was not yet completed, which related to the job for design and construction of cooling water system and skimmer bay.

84. Therefore, in our considered opinion, since the entitlement for reimbursement had to be supported by the authentic document, taking an over-all view of the fact that the liability itself was under litigation in this Court, which came to be ultimately decided by the Division Bench of this Court in December 1992 (1993 (Vol.88) S.T.C. 289) (cited supra) and the modalities came to be finalised by the Commercial Tax Department in August 1994, the plaintiff can at best be held to have been entitled for such reimbursement by relying upon the ultimate order of assessment. We say so because a reading of the Clause relating to reimbursement in the acceptance letter makes it clear that while the payment of the sales tax in the first instance should be made by the plaintiff, the reimbursement will depend upon the production of authentic documents in proof of such payment. Further, when the Clause contained in the acceptance letter states that any benefit derived in the appeal proceedings, should be passed on to the TNEB, a finality to the sales tax liability and its reimbursement can be said to arise upto the stage when the appeal proceedings are finally concluded. When once the TNEB has come forward to reimburse the sales tax liability, a public body cannot be expected to reject the said benefit of reimbursement by stating that the same was not claimed in time, especially when such statutory liability was not a definite factor till the assessment came to be finally concluded in July 1998 in one case and January 2001 in another case.

85. Therefore, we hold that the suit as filed by the plaintiff for claiming reimbursement was not barred by limitation and consequently, we hold that the plaintiff is entitled to claim for reimbursement of whatever sales tax liability incurred by it towards the contract for construction of 275 meter high R.C.C. multiflue chimney and cooling water system with skimmer bay for the North Madras Thermal Power Project of the TNEB.

86. The next question that arise for consideration is whether such right to claim reimbursement can straightaway be granted as claimed by the plaintiff based on Exs.P-35 and 36, which are the Certificates issued by the statutory Auditors wherein the sales tax payments have been certified in respect of the two works.

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87. On a perusal of Exs.P-35 and P-36, we find that the Auditors though have certified that the sales tax on Works Contract was paid by the

plaintiff on behalf of the TNEB during the period April 1992 to March 1994 in respect of 275 meter high chimney and for the period April 1992 to March 1994 in respect of the cooling tower system with skimmer bay, there were no documentary evidence to support the claim that such tax was actually paid into the coffers of the State Revenue. The Clauses pertaining to the sales tax reimbursement are specific to the effect that there should be documentary evidence of having paid such taxes. Though learned counsel appearing for the plaintiff would contend that the Certificates issued by the statutory Auditors have greater value, having regard to the specific terms contained in the contract between the parties, it is the bounden duty of the plaintiff to produce authentic proof in the form of documents to show that the sales tax was in fact paid to the Commercial Tax Department. Therefore, even while holding that the plaintiff is entitled for reimbursement, we feel that the plaintiff should be given an opportunity to prove that such payment was supported by material documents in whatever form it may be to show that such payment was acknowledged by the Commercial Tax authorities either in the form of receipts or as acknowledged in any other form specifying the quantum as claimed by the plaintiff to have been paid towards sales tax liability.

88. Therefore, while answering issue Nos(i) to (iii) in O.S.A.No.386 of 2001, we hold that the suit was not barred by limitation and the plaintiff is entitled for reimbursement, we also hold that the plaintiff should be given an opportunity to prove that necessary documentary evidence for actual payment made by it by way of sales tax to the Commercial Tax authorities.

89. Having regard to our above said conclusions on issue Nos.(i) to (iii) in O.S.A.No.386 of 2001, on issue No.(iv) in O.S.A.No.386 of 2001, we set aside the judgment and decree of the learned single Judge and remit the matter for the limited purpose of enabling the plaintiff to prove its entitlement in the form of authentic documents to claim for reimbursement. In view of the fact that the plaintiff had not so far produced the required materials in proof of such payment, though the payment of sales tax cannot be doubted, we hold that there is no scope for awarding payment of any interest on that score. Therefore, we hold that the plaintiff is not entitled for any interest for the reimbursement of the sales tax liability.

90. The appeal O.S.A.No.386 of 2001 therefore stands allowed as indicated above and there will be no order as to costs.

91. In the result,

(i) O.S.A.No.418 of 2001 (relating to C.S.No.705 of 1992) stands allowed with costs throughout and the judgment and decree of the learned single Judge is hereby set aside. Since the suit itself stands dismissed, the sum of Rs.15,42,096/- deposited by the TNEB and withdrawn by the plaintiff pursuant to the interim order dated 13.3.2002 passed in C.M.P.No.744 of 2002 in O.S.A.No.418 of 2001, is liable to be paid back by the plaintiff to the TNEB. Accordingly, the plaintiff is directed to pay back the said sum of Rs.15,42,096/- (Rupees fifteen lakhs forty two thousand and ninety six only) along with interest @ 12% from the date of withdrawal till the date of repayment to the TNEB.

(ii) O.S.A.No.390 of 2001 (relating to C.S.No.110 of 1996) stands partly allowed with proportionate costs throughout and the judgment and decree of the learned single Judge insofar as it related to the grant of Rs.13,90,535/- is set aside and in other respects, the suit stands decreed. Since the suit stands partly decreed, from and out of

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Rs.65,19,604/- lying in Court deposit, which deposit was made by the TNEB during the pendency of the appeal, pursuant to the interim order of this Court, the plaintiff shall be permitted to withdraw whatever sum due and payable to it pursuant to the relief granted in paragraphs 69 and 70 of this judgment and if the said sum of Rs.65,19,604/- does not satisfy the decree amount, the plaintiff shall be entitled to recover the same from the TNEB. On the other hand, if the decree amount is less than the sum of Rs.65,19,604/-, after satisfying the decree amount, whatever amount that remains in Court deposit, shall be refunded to the TNEB with proportionate accrued interest, if any.

(iii) O.S.A.No.386 of 2001 (relating to C.S.No.472 of 1999) stands allowed and while setting aside the judgment and decree of the learned single Judge, the matter is remitted for consideration on the question of ascertaining the liability by permitting the plaintiff to let in additional evidence and also permit the TNEB to let in necessary counter-evidence if any, to meet such claim. There will be no order as to costs.

cs

Sd/
Asst.Registrar

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Sub Asst.Registrar

To

1. The Sub Assistant Registrar,
Original Side, High Court, Madras.

+ 3 cc's to Mr.Ananthakrishnan, Advocate SR 48417 to 48419
+ 3 cc's to Mr N. Muthuswami, Advocate SR 48326 to 48328

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O.S.A.Nos.386, 390 and 418 of 2006
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